

Honorable Judge Benjamin Settle

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

CLYDE RAY SPENCER, MATTHEW RAY)
SPENCER, and KATHRYN E. TETZ,)

No. C11-5424BHS

Plaintiffs,)

PLAINTIFF'S RESPONSE TO
DEFENDANTS' MOTION TO
STRIKE PLAINTIFF'S
SUPPLEMENTAL DISCLOSURE
PURSUANT TO FED. R. CIV. P.
26(a)(1) AND TO BAR
TESTIMONY

v.)

FORMER DEPUTY PROSECUTING)
ATTORNEY FOR CLARK COUNTY JAMES)
M. PETERS, DETECTIVE SHARON KRAUSE,)
SERGEANT MICHAEL DAVIDSON, CLARK)
COUNTY PROSECUTOR'S OFFICE, CLARK)
COUNTY SHERIFF'S OFFICE, THE COUNTY)
OF CLARK and JOHN DOES ONE THROUGH)
TEN,)

**NOTE ON MOTION
CALENDAR:
Friday, December 7, 2012**

Defendants.)

PLAINTIFF CLYDE RAY SPENCER, by and through his attorneys, Kathleen T.

Zellner & Associates, P.C. and Davis Wright Tremaine LLP, for his Response to Defendants'

Motion to Strike his Supplemental Disclosures pursuant to Rule 26(a)(1) of the Federal Rules

of Civil Procedure states as follows:

I. No Justification or Basis In Law For Relief Defendants Seek

Citing no court ordered deadline or case law, Defendants' seek to strike Plaintiff's
timely filed Supplemental 26(a)(1) Disclosure. Defendants' motion is completely without
merit and surprising especially based on the diligence exhibited by Plaintiff in this case.

PLAINTIFF'S RESPONSE TO DEFENDANTS' MOTION TO
STRIKE SUPPLEMENTAL DISCLOSURE AND BAR
TESTIMONY (C11-5424BHS) — 1

DWT 20687516v1 0094078-000001

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II. Diligence

In the past 14 days, seven lengthy depositions have been completed. (Declaration of Kathleen Zellner in support of Plaintiff's Response to Defendants' Motion to Strike Plaintiff's Supplemental Disclosures pursuant to Rule 26(a)(1) of the Federal Rules of Civil Procedure ("Zellner Dec.") ¶ 3). Three of those depositions were of the Defendants, and Plaintiff arranged to proceed by teleconference. Zellner Dec. ¶ 3. The next three depositions were of Plaintiff and his children. Zellner Dec. ¶ 3. Two attorneys from Plaintiff's counsel's office traveled to Seattle, Washington for those depositions. Zellner Dec. ¶ 3. On the day of the final deposition in Seattle, November 14, 2012, defense counsel announced that the deposition of DeAnne Spencer would proceed on November 16, 2012. Zellner Dec. ¶ 3. Upon information and belief, Notice of this deposition had not been received by Plaintiff's counsel. Zellner Dec. ¶ 3. Further, no reference to DeAnne Spencer's deposition was made at any time prior to defense counsel's announcement. Zellner Dec. ¶ 3. Nonetheless, to adhere to the schedule, Plaintiffs' counsel appeared by telephone and the deposition proceeded and concluded. Zellner Dec. ¶ 3.

It would be contrary to the nature of the discovery process to require Plaintiff to Supplement his disclosures prior to the completion of those depositions and the discovery of important information gathered from them. Further, it should be noted that Plaintiff had served Notice on June 18, 2012 for the depositions of Defendants Krause, Davidson and Peters. Zellner Dec. ¶ 4 and Exhibit A. Those notices requested deposition dates of September 10, 2012, September 11, 2012 and September 12, 2012, respectively. Zellner Dec. Exhibit A. Due to a number of factors, including the number of attorneys involved and even the deponents'

vacations, the depositions did not proceed until November 5, 2012. Zellner Dec. ¶ 4. Still, Plaintiff filed the Supplemental Disclosure immediately after the first round of depositions.

It should also be noted that Plaintiff has been investing intense time and resources to this case. Zellner Dec. ¶ 5. For example, adhering to the schedule, prior to the above depositions, Plaintiff submitted multiple expert reports and is prepared to present those experts at times requested by Defense counsel. Zellner Dec. ¶ 5.

III. Supplemental Disclosure made at Earliest Possible Time To Further Focus Issues

Plaintiff could have long ago disclosed hundreds of witnesses because this complex case dates back decades. However, through the process of discovery including the very recent testimony of defendants, Plaintiff has properly narrowed its focus on the most relevant issues in the case. During and after the first seven depositions, Plaintiff's counsel reviewed the information obtained from those depositions and continued to form a litigation strategy. Zellner Dec. ¶ 6. Then, on November 19, 2012, the first business day after DeAnne's Spencer's deposition, Plaintiff filed a Supplemental Disclosure identifying only 12 witnesses. Zellner Dec. ¶ 6.

IV. No Prejudice

There are still five months until the trial of this case. No deadline has passed and Defendants have failed to even suggest how they could be prejudiced by Plaintiff's timely disclosure.

V. Treating Physicians Not Rule 26 (a)(2) Experts

Defendants argue that three physicians disclosed by Plaintiffs "should regarded as experts." (D. Mot. P. 4). This assertion is incorrect. Drs. Sweetman, Ruud and Leppien are

1 treating physicians. Treating physicians are not subject to the strict reporting requirements of
2 Fed. R. Civ. Proc. Rule 26(a)(2). Elgas v. Colorado Belle Corp., 179 F.R.D. 296 (1998).

3 WHEREFORE, for the reasons stated herein, Plaintiff respectfully requests that
4 Defendant's Motion to Strike Plaintiff's Supplemental Disclosure Pursuant to
5 Fed.R.Civ.26(a)(1) and to Bar Testimony be denied, and for any and all other relief deemed
6 appropriate.

7 Respectfully submitted,

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9
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DECLARATION OF SERVICE

I hereby certify that on November 20, 2012, I caused the foregoing to be electronically filed with the Clerk of the Court using the CM/ECF System, which will send notification of such filing to the following counsel of record:

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